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Overview of the Judgments[1]

On the classification of Special Protected Area's in Bulgaria

Judgment of the Court (Second Chamber) of 26 April 2018 in Case C-97/17 – *European Commission v Republic of Bulgaria*

Subject Matter

This case concerns an infringement procedure against Bulgaria, for failing to include the entire Important Bird Area ('IBA') covering the Rila Mountains (Bulgaria) ('IBA Rila') as a Special Protection Area ('SPA') under the Birds Directive. The dispute concerns in particular the margin of discretion that Member States have as regards the designation of SPAs.

Key findings

64 In that regard, the Court has held that the Member States' margin of discretion in choosing the most suitable territories for classification as SPAs concerns not the appropriateness of classifying as SPAs the territories

1 Only judgements and orders available on Curia.eu under the subject matter ´environment´ and 'provisions concerning the institutions/access to documents' have been included in this report.

which appear most suitable according to ornithological criteria, but only the application of those criteria for identifying the most suitable territories for conservation of the species listed in Annex I to the Birds Directive (judgment of 14 January 2016, Commission v Bulgaria, C-141/14, EU:C:2016:8, paragraph 29 and the case-law cited).

67 Accordingly, the Republic of Bulgaria cannot rely on the discretion enjoyed by the Member States to justify the merely partial classification as SPAs of territories which, taken as a whole, meet the ornithological criteria referred to in Article 4(1) of the Birds Directive.

83 The Court has thus repeatedly held that, in view of the scientific nature of the IBA inventory and of the absence of any scientific evidence adduced by a Member State tending in particular to show that the obligations flowing from Article 4(1) and (2) of the Birds Directive could be satisfied by classifying as SPAs sites covering a smaller total area than that resulting from that inventory, the inventory could be used as a basis of reference for assessing whether a Member State has classified a sufficient number and size of areas as SPAs for the purposes of Article 4(1) of that directive (see, to that effect, judgments of 20 March 2003, Commission v Italy, C-378/01, EU:C:2003:176, paragraph 18, and of 13 December 2007, Commission v Ireland, C-418/04, EU:C:2007:780, paragraph 52).

Access to documents generating from a Member State

Judgment of the General Court (Ninth Chamber) of 3 May 2018 in Case T-653/16 – *Republic of Malta v European Commission*

Subject Matter

This case concerns an action for annulment started by Malta against the decision of the Secretary-General of the Commission of 13 July 2016 on a confirmatory application by Greenpeace for access to documents relating to an allegedly irregular shipment of live bluefin tuna from Tunisia to a fish farm located in Malta, in so far as it grants Greenpeace access to documents originating from the Maltese authorities.

Key findings

167 In those circumstances, Article 113(2) and (3) of Regulation No 1224/2009 was applicable to the data contained in Documents Nos 112 to 230.

168 It follows that, unless it were able to rely on Article 113(4) and (6) of Regulation No 1224/2009, the Commission could not disclose to the public

and, in particular, transmit to a non-governmental organisation the data contained in Documents Nos 112 to 230 without the express consent of the Republic of Malta.

175 It follows from all the foregoing, first, that the contested decision must be annulled in so far as it grants Greenpeace access to Documents Nos 112 to 230 and, second, that the remainder of the application must be dismissed.

On the allocation of free allowances to a process of separation of hydrogen in a rich gas stream which already contains hydrogen

Judgment of the Court (Sixth Chamber) of 17 May 2018 in Case C-229/17 – *Evonik Degussa GmbH v Federal Republic of Germany*

Subject Matter

This request for a preliminary ruling concerns the interpretation of, most notably, Commission Decision 2011/278/EU determining transitional Union-wide rules for harmonised free allocation of emission allowances pursuant to Article 10a of Directive 2003/87/EC establishing a scheme for greenhouse gas emission allowance trading within the Community (ETS Directive) and of the ETS Directive itself. The request has been made in proceedings between Evonik Degussa GmbH and the Federal Republic of Germany concerning the refusal by the competent national authorities to allocate to Evonik Degussa GmbH free greenhouse gas emission allowances in the context of implementing a process of separation of hydrogen in a rich gas stream which already contains hydrogen. The national court wanted to know, in essence, whether a process element which does not produce hydrogen by chemical synthesis, but only isolates hydrogen already contained in a gas mixture, falls within the system boundaries of the product benchmark for hydrogen under Decision 2011/178.

Key findings

36 As regards, on the one hand, 'production of hydrogen', that concept must be interpreted in the light of the wording of Annex I to Directive 2003/87 as including hydrogen production by reforming or partial oxidation.

37 On the other hand, as regards 'the separation of hydrogen and carbon monoxide', such a process does not consist of the production of hydrogen by chemical synthesis but the mere extraction of hydrogen already contained in a gas mixture.

38 Therefore, in itself, that process is not covered by the product benchmark for hydrogen as defined in Annex I, Part 2, to Decision 2011/278. That process is, however, covered by the product benchmark for hydrogen provided that it is associated with the 'production of hydrogen' within the meaning of Annex I to Directive 2003/87 and Annex I, Part 2, to Decision 2011/278 and has a technical connection with that production.

39 It follows, in particular, that an activity such as that of the applicant in the main proceedings, in so far as it consists solely of the separation of hydrogen from a rich gas mixture—which contains approximately 85% to 95% of hydrogen—cannot be considered as 'production of hydrogen' within the meaning of Annex I to Directive 2003/87 and of Annex I, Part 2, to Decision 2011/278.

47 It follows from all of the foregoing considerations that Annex I, Part 2, to Decision 2011/278 must be interpreted as meaning that a process, such as that at issue in the main proceedings, which does not produce hydrogen by chemical synthesis, but only isolates hydrogen already contained in a gas mixture, does not fall within the system boundaries of the product benchmark for hydrogen. It would be otherwise only if that process, first, is associated with 'production of hydrogen' within the meaning of Annex I to Directive 2003/87 and, second, have a technical connection with it.

On the precautionary principle, cost-benefit analyses and impact assessments

Judgment of the General Court (First Chamber, Extended Composition) of 17 May 2018 in Case T-584/13 – *BASF Agro BV and Others v European Commission*

Subject Matter

This case concerns an action for annulment of Commission Implementing Regulation (EU) No 781/2013, as regards the conditions of approval of the active substance fipronil, and prohibiting the use and sale of seeds treated with plant protection products containing this active substance. To substantiate their claim, the applicants raise complaints alleging infringement of Article 4, Article 12(2), Articles 21 and 49 and point 3.8.3 of Annex II to Regulation No 1107/2009, breach of the principles of legal certainty, protection of legitimate expectations and respect for the rights of the defence, breach of the precautionary principle and of the principles of proportionality and of good administration, and infringement of the obligation to state reasons.

Key findings

171 In conclusion, it must be held that the Commission was obliged, pursuant to the precautionary principle, to carry out an impact assessment of the measures proposed. As is apparent from paragraphs 162 and 163 above, the formal and substantive requirements in that respect were moderate.

172 The Commission has acknowledged that there was no written record of such an assessment. Given that it must be assumed that there would have been a written record of any—even summary—assessment in the administrative file, and given that the Commission asserted that the College of Commissioners was sufficiently informed by the impact assessment conducted in connection with the restriction of the approval of neonicotinoids, it must be concluded from that absence of any written record that no impact assessment of the restrictions imposed by the contested measure was in fact carried out.

173 The complaint alleging that there was no impact assessment and, accordingly, the plea alleging breach of the precautionary principle, must therefore be upheld. Since the contested measure was founded on that principle, Articles 1, 3 and 4 of that measure must be annulled for that reason, and there is no need to examine the other pleas and arguments put forward by BASF.

On the concept of plans and programmes under the SEA Directive (I)

Judgment of the Court (Second Chamber) of 7 June 2018 in Case C-671/16 – *Inter-Environnement Bruxelles ASBL and Others*

Subject Matter

This request for a preliminary ruling concerns the interpretation of Article 2(a) of Directive 2001/42/EC of the European Parliament and of the Council of 27 June 2001 on the assessment of the effects of certain plans and programmes on the environment (the SEA Directive). The request has been made in proceedings between Inter-Environnement Bruxelles ASBL, and Others, and Brussels Capital Region (Belgium), concerning the validity of the decree adopted by the Government of that region on 12 December 2013 approving the regional zoned town planning regulations and the composition of the planning permission and certificate application file for the area of Rue de la Loi and its surroundings. The referring court wanted to know, in essence, whether, on a proper construction of Article 2(a) and Article 3 of the SEA Directive, regional zoned town planning regulations, such as those at issue in the main proceedings, laying down certain requirements for the completion of building projects, fall under the definition

of 'plans and programmes' which are likely to have significant environmental effects within the meaning of that directive and must, consequently, be subjected to an environmental impact assessment.

Key findings

54 That interpretation of the concept of 'plans and programmes' is intended to ensure, as was noted by the Advocate General in point 23 of her Opinion, that provisions which are likely to have significant effects on the environment are subject to an environmental assessment.

55 Therefore, as was noted by the Advocate General in points 25 and 26 of her Opinion, the concept of 'a significant body of criteria and detailed rules' must be construed qualitatively and not quantitatively. It is necessary to avoid strategies which may be designed to circumvent the obligations laid down in the SEA Directive by splitting measures, thereby reducing the practical effect of that directive (see, to that effect, judgment of 27 October 2016, D'Oultremont and Others, C-290/15, EU:C:2016:816, paragraph 48 and the case-law cited).

65 Furthermore, an environmental impact assessment report completed under the EIA Directive cannot be used to circumvent the obligation to carry out the environmental assessment required under the SEA Directive in order to address environmental aspects specific to that directive.

66 Thus, the fact, raised by the referring court, that the future planning permission applications will be subjected to an impact assessment procedure under the EIA Directive is not capable of calling in question the need to carry out an environmental assessment of a plan or a programme falling within the scope of Article 3(2)(a) of the SEA Directive and establishing the framework within which those town planning projects will subsequently be authorised, unless an assessment of the environmental effects of that plan or programme, as referred to in paragraph 42 of the judgment of 22 March 2012, Inter-Environnement Bruxelles and Others (C-567/10, EU:C:2012:159), has already been carried out.

On the concept of plans and programmes under the SEA Directive (II)

Judgment of the Court (Second Chamber) of 7 June 2018 in Case C-160/17 – *Raoul Thybaut and Others*

Subject Matter

Similarly to the previous case, this request for a preliminary ruling concerns the interpretation of Article 2(a) of the SEA Directive. In this case, the request

has been made in proceedings between Mr Raoul Thybaut, and Others, on the one hand, and, on the other, the Walloon Region (Belgium) concerning the validity of an order of the Government of that region of 3 May 2012 defining an urban land consolidation area in respect of a district of the Orp-Jauche municipality (Belgium). The referring court wanted to know, in essence, whether Article 2(a) and Article 3 of the SEA Directive must be interpreted as meaning that a consolidation area, such as that at issue in the main proceedings, the sole purpose of which is to determine a geographical area in which an urban development plan may be carried out with the objective of renovating and developing urban functions requiring the creation, modification, removal or overhang of roads and public spaces in carrying out that plan, in respect of which it will be permissible to derogate from certain planning requirements, comes within the concept of 'plans and programmes' likely to have significant effects on the environment within the meaning of that directive, and must therefore be subject to an environmental impact assessment.

Judgment

Article 2(a), Article 3(1) and Article 3(2)(a) of Directive 2001/42/EC of the European Parliament and of the Council of 27 June 2001 on the assessment of the effects of certain plans and programmes on the environment must be interpreted as meaning that an order adopting an urban land consolidation area, the sole purpose of which is to determine a geographical area within which an urban development plan may be carried out with the objective of renovating and developing urban functions and requiring the creation, modification, removal or overhang of roads and public spaces in carrying out that plan, in respect of which it will be permissible to derogate from certain planning requirements, comes, because of that possibility of derogation, within the concept of 'plans and programmes' likely to have significant effects on the environment within the meaning of that directive, thereby necessitating an environmental assessment.

On the protection of birds in Malta

Judgment of the Court (Third Chamber) of 21 June 2018 in Case C-557/17 – *European Commission v Republic of Malta*

Subject Matter

By the present action, the European Commission asks the Court to declare that, by adopting a derogation regime allowing the live-capturing of seven species of wild finches (Chaffinch Fringilla coelebs, Linnet Carduelis cannabina, Goldfinch Carduelis carduelis, Greenfinch Carduelis chloris, Hawfinch

Coccothraustes coccothraustes, Serin Serinus serinus and Siskin Carduelis spinus), the Republic of Malta has failed to fulfil its obligations under Article 5(a) and (e), and 8(1) in connection with point (a) of Annex IV of the Birds Directive, read in conjunction with Article 9(1) of that Directive.

Key findings

47 It should be borne in mind that, according to the case-law of the Court, in order to permit the competent authorities to resort to the derogations laid down in Article 9 of Directive 2009/147 only in a manner which complies with EU law, the national legislative and regulatory framework must be designed in such a way that the application of the derogating provisions set out there is consonant with the principle of legal certainty. Accordingly, the applicable national legislation must specify the criteria for the derogation clearly and precisely and require the authorities responsible for their application to take them into account. In respect of exceptional arrangements, which must be interpreted strictly and impose on the authority taking the decision the burden of proving that those conditions exist for each derogation, the Member States are required to ensure that all action affecting the protected species is authorised only on the basis of decisions containing a clear and sufficient statement of reasons which refers to the reasons, conditions and requirements laid down in Article 9(1) and (2) of that directive (see, to that effect, judgment of 8 June 2006, WWF Italia and Others, C-60/05, EU:C:2006:378, paragraphs 33 and 34).

48 As regards Malta's legislation, it must be noted that, contrary to what the Commission, in essence, claims, the applicable national legislation concerning the conservation of wild birds sets out the criteria for derogation clearly and precisely and requires the authorities responsible for their application to take them into account. As indicated in paragraphs 10 and 16 of the present judgment, Regulation 9 of the Conservation of Wild Birds Regulations transposes, in essence, Article 9 of Directive 2009/147, whereas Regulation 4 of the Framework Regulations requires the Minister to verify, when opening an Autumn finch live-capturing season, that there is no other satisfactory solution, within the meaning of Article 9(1) of Directive 2009/147. That finding cannot be called into question by the fact, raised by the Commission, that the Framework Regulations do not contain any reference to captive breeding and do not specifically require the Minister to assess whether captive breeding constitutes another satisfactory solution before authorising the trapping of finches for a specific season.

49 By contrast, it must be held that the 2014 and 2015 Declarations authorising the Autumn trapping of finches during the 2014 and 2015 seasons do not comply with Article 9 of Directive 2009/147.

50 Those declarations do not contain any reference to the absence of another satisfactory solution. Furthermore, in any event, those declarations do not refer to the technical, legal and scientific reports which, according to the Republic of Malta, had been submitted to the Ornis Committee, nor to the recommendations based on that information, which, according to that Member State, had been made by the Ornis Committee to the Minister and called for the implementation of the derogation at issue given that all the conditions laid down in Article 9(1)(c) of Directive 2009/147, including the absence of another satisfactory solution, had been found to be met.

51 It follows that those declarations do not constitute decisions containing a clear and sufficient statement of reasons concerning the condition of the absence of another satisfactory solution laid down in Article 9 of Directive 2009/147.

On the validity of the market stability reserve for the ETS Directive

Judgment of the Court (Second Chamber) of 21 June 2018 in Case C-5/16 – *Republic of Poland v European Parliament and Council of the European Union*

Subject Matter

By its application, the Republic of Poland asks the Court to annul Decision (EU) 2015/1814 of the European Parliament and of the Council concerning the establishment and operation of a market stability reserve (MSR) for the Union greenhouse gas emission trading scheme and amending the ETS Directive.

Key Findings

42 Consequently, it must be found that the assessment of the effect of an EU measure on a Member State's energy policy is not a factor that must be assessed in addition to the aim and content of that act, or by derogation therefrom.

46 It follows that point (c) of the first subparagraph of Article 192(2) TFEU can form the legal basis of an EU measure only if it follows from the aim and content of that measure that the primary outcome sought by that measure is significantly to affect a Member State's choice between different energy sources and the general structure of the energy supply of that Member State.

69 Consequently, as the Advocate General observed in point 24 of his Opinion, as the MSR is designed merely as a supplement or a correction of the ETS, the EU legislature was fully entitled to base the contested decision on Article 192(1) TFEU.

On the failure to fulfil EU waste management law in Slovakia

Judgment of the Court (Fourth Chamber) of 4 July 2018 in Case C-626/16 – *European Commission v Slovak Republic.*

Subject Matter

By its action, the European Commission claims that the Court should declare that, by failing to adopt measures to comply with the judgment of 25 April 2013, Commission v Slovakia (C-331/11, EU:C:2013:271), in which the Court declared that the Slovak Republic had failed to fulfil its obligations under Article 14(a) to (c) of Council Directive 1999/31/EC on the landfill of waste, the Slovak Republic has failed to fulfil its obligations under Article 260(1) TFEU. The Commission also asked the imposition of a penalty payment and a lump som.

Judgment

1. Declares that, by failing to take all the measures necessary to comply with the judgment of 25 April 2013, Commission v Slovakia (C-331/11, not published, EU:C:2013:271), the Slovak Republic has failed to fulfil its obligations under Article 260(1) TFEU;
2. Orders that if the failure to fulfil obligations established in point 1 has continued until the day of delivery of the present judgment the Slovak Republic must pay the European Commission a penalty payment of EUR 5 000 for each day of delay in implementing the measures necessary to comply with the judgment of 25 April 2013, Commission v Slovakia (C-331/11, not published, EU:C:2013:271), from the date of delivery of the present judgment until the judgment of 25 April 2013, Commission v Slovakia (C-331/11, not published, EU:C:2013:271), has been complied with in full;
3. Orders the Slovak Republic to pay the European Commission a lump sum of EUR 1 000 000;

On the meaning of several concepts under the Montego Bay Convention and the Ship-source Pollution Directive

Judgment of the Court (Third Chamber) of 11 July 2018 in Case C-15/17 - *Bosphorus Queen Shipping Ltd Corp.*

Subject Matter

This request for a preliminary ruling concerns the interpretation of Article 220(6) of the Montego Bay Convention on the Law of the Sea, and Article 7(2) of Directive 2005/35/EC on ship-source pollution and on the introduction of penalties, including criminal penalties, for pollution offences. The request has been made in proceedings between Bosphorous Queen Shipping Ltd Corp. ('Bosphorous') the company which owns the dry cargo vessel Bosphorous Queen, registered in Panama, and the Rajavartiolaitos (Finnish Border Protection Agency) concerning a fine imposed by the latter on that company on account of an oil spill by that vessel in the Finnish exclusive economic zone (EEZ). The referring court wanted to know in essence how to interpret the expressions clear objective evidence', 'coastline or related interests', 'resources of the territorial see or EEZ', 'significant pollution' as well as other practical aspects about the consequences of a violation of the convention and of the Directive.

Key Findings

49 Fourth, having regard to the finding in paragraph 44 of the present judgment, Article 7(2) of Directive 2005/35, which incorporates into EU law the provisions of Article 220(6) of the Montego Bay Convention, and whose wording is almost identical to it, must be interpreted in accordance with the latter. Therefore, the interpretation of Article 220(6) of the Montego Bay Convention must, in principle, be regarded as being applicable to Article 7(2) of Directive 2005/35.

65 Therefore, the answer to the first sentence of Question 10 is that Article 220(6) of the Montego Bay Convention and Article 7(2) of Directive 2005/35 must be interpreted as meaning that the expression 'clear objective evidence' within the meaning of those provisions covers not only the commission of a violation, but also evidence of the consequences of that violation.

79 It follows from all of the foregoing considerations that the answer to Questions 1 to 3 is that the expression 'coastline or related interests' in Article 220(6) of the Montego Bay Convention and Article 7(2) of Directive 2005/35, must be interpreted as meaning that, in principle, it has the same meaning as the expression 'coastline or related interests' in Article 1(1) and Article 11(4) of the Convention Relating to Intervention on the High Seas 1969, it being understood that Article 220(6) of the Montego Bay Convention also applies to non-living resources of the territorial sea of the coastal State and to any resources in its EEZ.

84 Therefore, the answer to Question 4 is that Article 220(6) of the Montego Bay Convention and Article 7(2) of Directive 2005/35 must be interpreted as meaning that the resources of the territorial sea and the EEZ of a coastal State, within the meaning of those provisions, cover both harvested species and also species associated with them and which are dependent on them, such as animal and plant species which feed on the harvested species.

92 Therefore, the answer to Question 6 is that it is unnecessary, in principle, to take account of the concept of 'significant pollution' referred to in Article 220(5) of the Montego Bay Convention when applying Article 220(6) of that convention and Article 7(2) of Directive 2005/35 and, in particular, when assessing the consequences of a violation, such as those defined in those provisions.

102 It follows from all of the foregoing considerations that the answer to Questions 5, 7 and the last two sentences of Question 10 is that in order to assess the consequences of a violation, as defined in Article 220(6) of the Montego Bay Convention and Article 7(2) of Directive 2005/35, all the evidence to establish that damage has been caused or that there is a threat of damage to the resources and related interests of the coastal State and to evaluate the extent of the damage caused or threatened to those resources or related interests, taking account inter alia of

- the cumulative nature of the damage on several or all of those resources and related interests and the difference in sensitivity of the coastal State with regard to damage to its various resources and related interests;
- the foreseeable harmful consequences of discharge on those resources and related interests, not only on the basis of the available scientific data, but also with regard to the nature of the harmful substance(s) contained in the discharge concerned and the volume, direction, speed and the period of time over which the oil spill spreads.

108 It is clear from those considerations that the answer to Question 9 is that the specific geographical and ecological characteristics and sensitivity of the Baltic Sea area have an effect on the conditions of applicability of Article 220(6) of the Montego Bay Convention and Article 7(2) of the Directive 2005/35 as regards the definition and classification of the violation and, although not automatically, on the assessment of the extent of the damage that that violation has caused to the resources and related interests of the coastal State.

118 It is clear from the foregoing considerations that the answer to Question 8 is that Article 1(2) of Directive 2005/35 must be interpreted as meaning

that it does not allow the Member States to impose more stringent measures in accordance with international law than those laid down in Article 7(2) thereof, where international law is applicable, given that the coastal States are authorised to take other measures equivalent in scope to those in Article 220(6).

On the classification of organisms and cultivations as genetically modified

Judgment of the Court (Grand Chamber) of 25 July 2018 in Case C-528/16 – *Confédération paysanne and Others*

Subject Matter

This request for a preliminary ruling concerns the interpretation of Articles 2 and 3 of, and of Annexes I A and I B to, Directive 2001/18/EC on the deliberate release into the environment of genetically modified organisms, as well as the interpretation of Article 4 of Directive 2002/53/EC on the common catalogue of varieties of agricultural plant species. The request has been made in proceedings between, on the one hand, Confédération paysanne, Réseau Semences Paysannes, and Others, and, on the other hand, the French Prime Minister and the French Minister for Agriculture, the Food Processing Industry and Forestry, concerning the refusal to revoke the national legislation according to which organisms obtained by mutagenesis are not, in principle, considered to result in genetic modification, and the refusal to ban the cultivation and marketing of herbicide-tolerant rape varieties obtained by mutagenesis. The referring court wanted to know in essence whether organisms obtained by means of techniques/methods of mutagenesis constitute GMOs within the meaning of Article 2(2) of Directive 2001/18, and whether genetically modified varieties obtained by means of techniques/methods of mutagenesis are exempt from the obligations laid down in Article 4(4) of Directive 2002/35. Moreover, it wanted to know whether Article 3(1) of Directive 2001/18, read in conjunction with point 1 of Annex I B to that Directive, must be interpreted as meaning that it has the effect of denying Member States the option of subjecting the organisms obtained by means of techniques/methods of mutagenesis that are excluded from the scope of the directive to the obligations laid down in that directive or to other obligations.

Judgment

1. Article 2(2) of Directive 2001/18/EC of the European Parliament and of the Council of 12 March 2001 on the deliberate release into the environment of genetically modified organisms and repealing Council Directive

90/220/EEC must be interpreted as meaning that organisms obtained by means of techniques/methods of mutagenesis constitute genetically modified organisms within the meaning of that provision.

Article 3(1) of Directive 2001/18, read in conjunction with point 1 of Annex I B to that directive and in the light of recital 17 thereof, must be interpreted as meaning that only organisms obtained by means of techniques/methods of mutagenesis which have conventionally been used in a number of applications and have a long safety record are excluded from the scope of that directive.

2. Article 4(4) of Council Directive 2002/53/EC of 13 June 2002 on the common catalogue of varieties of agricultural plant species, as amended by Regulation (EC) No 1829/2003 of the European Parliament and of the Council of 22 September 2003, must be interpreted as meaning that genetically modified varieties obtained by means of techniques/methods of mutagenesis which have conventionally been used in a number of applications and have a long safety record are exempt from the obligations laid down in that provision.
3. Article 3(1) of Directive 2001/18, read in conjunction with point 1 of Annex I B to that directive, in so far as it excludes from the scope of that directive organisms obtained by means of techniques/methods of mutagenesis which have conventionally been used in a number of applications and have a long safety record, must be interpreted as meaning that it does not have the effect of denying Member States the option of subjecting such organisms, in compliance with EU law, in particular with the rules on the free movement of goods set out in Articles 34 to 36 TFEU, to the obligations laid down in that directive or to other obligations.

Sweetman's quest to protect Irish habitats and wild fauna and flora continues

Judgment of the Court (Second Chamber) of 25 July 2018 in Case C-164/17 – *Edel Grace and Peter Sweetman*

Subject Matter

This request for a preliminary ruling concerns the interpretation of Article 6(3) and (4) of the Habitats Directive. The request has been made in proceedings between Ms Edel Grace and Mr Peter Sweetman, and the National Planning Appeals Board (Ireland), concerning the latter's decision granting ESB Wind Developments Ltd and Coillte permission for a wind farm project in a special protection area hosting the natural habitat of a protected species. The referring court wanted to know in essence whether under Article 6(3) of the Directive is

it possible to take into account the fact that the project includes measures to ensure that, after an appropriate assessment of the implications of the project has been carried out and throughout the lifetime of the project, the part of the site that is in fact likely to provide a suitable habitat will not be reduced and indeed may be enhanced.

Key findings

41 It is at the date of adoption of the decision authorising implementation of the project that there must be no reasonable scientific doubt remaining as to the absence of adverse effects on the integrity of the area in question (see, to that effect, judgment of 17 April 2018, Commission v Poland (Białowieża Forest), C-441/17, EU:C:2018:255, paragraph 120 and the case-law cited).

48 In the present case, it is apparent from the findings of the referring court that some parts of the SPA would no longer be able, if the project went ahead, to provide a suitable habitat but that a management plan would seek to ensure that a part of the SPA that could provide suitable habitat is not reduced and indeed may be enhanced.

49 Accordingly, as the Advocate General observed in paragraph 71 et seq. of his Opinion, while the circumstances of the main proceedings are different from those of the cases which gave rise to the judgments of 15 May 2014, Briels and Others (C-521/12, EU:C:2014:330), and of 21 July 2016, Orleans and Others (C-387/15 and C-388/15, EU:C:2016:583), those cases are similar in that they are based, at the time the assessment of the implications of the plan or project for the area concerned, on the same premiss that there will be future benefits which will address the effects of the wind farm on that area, even though those benefits are, moreover, uncertain. The lessons to be drawn from those judgments may therefore be transposed to a set of circumstances such as those of the main proceedings.

53 It is not the fact that the habitat concerned in the main proceedings is in constant flux and that that area requires 'dynamic' management that is the cause of uncertainty. In fact, such uncertainty is the result of the identification of adverse effects, certain or potential, on the integrity of the area concerned as a habitat and foraging area and, therefore, on one of the constitutive characteristics of that area, and of the inclusion in the assessment of the implications of future benefits to be derived from the adoption of measures which, at the time that assessment is made, are only potential, as the measures have not yet been implemented. Accordingly, and subject to verifications to be carried out by the referring

court, it was not possible for those benefits to be foreseen with the requisite degree of certainty when the authorities approved the contested development.

57 It follows that the answer to the question referred is that Article 6 of the Habitats Directive must be interpreted as meaning that, where it is intended to carry out a project on a site designated for the protection and conservation of certain species, of which the area suitable for providing for the needs of a protected species fluctuates over time, and the temporary or permanent effect of that project will be that some parts of the site will no longer be able to provide a suitable habitat for the species in question, the fact that the project includes measures to ensure that, after an appropriate assessment of the implications of the project has been carried out and throughout the lifetime of the project, the part of the site that is in fact likely to provide a suitable habitat will not be reduced and indeed may be enhanced may not be taken into account for the purpose of the assessment that must be carried out in accordance with Article 6(3) of the directive to ensure that the project in question will not adversely affect the integrity of the site concerned; that fact falls to be considered, if need be, under Article 6(4) of the directive.

On the environmental impacts of overhead electrical power lines in Austria

Judgment of the Court (Eighth Chamber) of 7 August 2018 in Case C-329/17 – *Gerhard Prenninger and Others*

Subject Matter

This request for a preliminary ruling concerns the interpretation of Article 4(2) of and Annex II to the EIA Directive. The request has been made in proceedings between Mr Gerhard Prenninger and eight other applicants, on the one hand, and the Government of the Province of Upper Austria, on the other, concerning the question whether the project for the construction of the '110 kV-Leitung Vorchdorf-Steinfeld-Kirchdorf' overhead electrical power line should be subject to a prior assessment of its effects on the environment. By its question, the referring court asks, in essence, whether point 1(d) of Annex II to the EIA Directive must be interpreted as meaning that the clearance of a path in a forest for the purpose of the construction and operation of an overhead electrical power line, such as that at issue in the main proceedings, and for the duration of its lawful existence is covered by the concept of 'deforestation for the purposes of conversion to another type of land use' within the meaning of that provision.

Judgment

Point 1(d) of Annex II to Directive 2011/92/EU of the European Parliament and of the Council of 13 December 2011 on the assessment of the effects of certain public and private projects on the environment must be interpreted as meaning that the clearance of a path in a forest for the purpose of the construction and operation of an overhead electrical power line, such as that at issue in the main proceedings, and for the duration of its lawful existence is covered by the concept of 'deforestation for the purposes of conversion to another type of land use' within the meaning of that provision.

Editor's Appraisal of the Reported Case Law

Given the length of this special issue, this editor appraisal will limit itself to introducing the case note. Indeed, among the cases reviewed in this reported period, the General Court's one of 17 May 2018 in Case T 584/13, on the meaning of the precautionary principle and the existence of an obligation to perform an impact assessment to comply with it, certainly is a peculiar one. To Ludwig Krämer the pleasure to open the discussion on this central topic.